ciples above stated, it results that specific performance of contracts to exercise general powers of appointment, other than those limited to testamentary execution, will be granted.[10] The same is true of contracts where the donee is a trustee, except that equity will not, of course, decree specific performance if to do so would cause a breach of trust.[11] The general rule covering all these cases is well stated by Mr. Farwell:[12] "Equity will decree specific performance of contracts involving the exercise of powers no less than other contracts, but, in addition to the ordinary defenses, there may be something in the nature of the power which is in itself a bar."

TAX-EXEMPTING COVENANTS AND THE INCOME TAX.—Covenants by a lessee or mortgagee to pay the taxes on the premises are common, and are subject to the ordinary rules of construction.[1] Such contracts are not limited to taxes levied under laws in force when the contract was made.[2] But in their usual form these covenants are held not to cover special assessments, as it is unjust to charge the expense of permanent improvement upon the property on one who is only a temporary occupant unless he has clearly assumed such expense.[3] In the recent case of *Suter* v. *Jordan Marsh Co.* (Mass. 1916) 113 N. E. 580, the court was called on to decide whether the income tax came within the terms of a covenant by a lessee to pay "all taxes and assessments . . . upon or in respect of the rent . . . . howsoever and to whomsoever assessed." The court held that the normal income tax withheld from the rent at the source by the lessee[4] came within the terms of the covenant, as a tax "upon or in respect of the rent".

Apparently the court makes little distinction between a tax "upon" the rent and one "in respect of" it, and hence the construction given here seems rather doubtful, at least in so far as it holds the income tax to be a tax "upon" the rent. The direction in paragraph E of the Federal Act that lessees and certain other persons withhold at the

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under such power is assets to pay the debts of the appointor. Beyfus *v.* Lawley [1903] A. C. 411. In New York, however, the appointor's creditors have no rights as to the appointed funds or property except where the power is absolute (as explained in note 3, *supra*). Cutting *v.* Cutting (1881) 86 N. Y. 522.

[10]*In re* Dykes' Estate (1869) L. R. 7 Eq. 337; *cf.* Gas Light & Coke Co. *v.* Towse (1887) 35 Ch. D. 519.

[11]See Gas Light & Coke Co. *v.* Towse, *supra.*

[12]Farwell, Powers (3rd ed.) 316.

[1]See Harvard College *v.* Aldermen of Boston (1870) 104 Mass. 470, 483.

[2]City of Norfolk *v.* J. W. Perry Co. (1908) 108 Va. 28, 61 S. E. 867; Welch *v.* Phillips (Mass. 1916) 112 N. E. 651; New England Mortgage Security Co. *v.* Vader (C. C. 1886) 28 Fed. 265; but *cf.* Fuller *v.* Kane (1896) 110 Mich. 549, 68 N. W. 267.

[3]Pettibone *v.* Smith (1892) 150 Pa. 118, 24 Atl. 693; see Chicago Gt. W. Ry. *v.* Kansas City N. W. R. R. (1907) 75 Kan. 167, 88 Pac. 1085, where a lessee for 999 years was compelled to pay special assessments, as not coming within the reason of the prevailing rule. But such a covenant, even though in very comprehensive terms, was held not to cover an inheritance tax. Northern Trust Co. *v.* Buck & Reyner (1914) 263 Ill. 222, 104 N. E. 1114.

[4]Income Tax Law (1913) § II E, 38 Stat. 169, 170.

source the normal tax imposed 'thereon" can hardly be regarded as a direct declaration by Congress that the tax is one on the rent, in view of the other provisions of the Act. It is plain that the purpose of the Act is to impose a tax on the net income in excess of a certain amount. There are express provisions as to deducting taxes, expenses of upkeep, and other items in order to compute the net income, and there are directions as to how these provisions and that exempting all income under a certain amount may be taken advantage of by one whose income is withheld at the source.[5] These provisions show that the tax is not levied on the rent as such; it is levied on the surplus net income from all sources, not on any single contributing item.[6] In a recent case, the United States Supreme Court described the income tax as an inherently indirect tax, and characterized the classification of such a tax according to the source of the income taxed as "testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income."[7] The provisions as to withholding the tax at the source do not make the tax one on that separate source, but merely furnish a method of guarding against neglect, error, or fraud by making the lessee an agent of the lessor to pay definitely or provisionally a part of the latter's income tax.[8] Hence it is at least doubtful whether the income tax comes clearly within the language of the contract in *Suter* v. *Jordan Marsh Co., supra,* and the reasons given above for exempting special assessments apply with equal force here against imposing such a burden on the lessee unless it is within the clear and specific terms of the lease.[9] Language may be comprehensive enough to bring the income tax clearly within its meaning,[10] but such a construction should not be

[5] *Id.* § II B, C, E, 38 Stat. 167, 168, 170.

[6] Van Beil *v.* Brogan (1914) 23 Pa. Dist. R. 1055; see North Pa. R. R. *v.* Phila. & Reading Ry. (1915) 249 Pa. 326, 95 Atl. 100; see *contra,* Catawissa R. R. *v.* Phila. & Reading Ry. (1916) 255 Pa. 269. The fact that no income tax would be due eventually, regardless of the amount of rent, unless the lessor's profits or net income from the rent and all other sources amounted to more than $3,000, shows that the tax is not one on the rent as such.

[7] Stanton *v.* Baltic Mining Co. (1916) 240 U. S. 103, 113, 36 Sup. Ct. 278, explaining Brushaber *v.* Union Pac. R. R. (1916) 240 U. S. 1, 36 Sup. Ct. 236. The Wisconsin Supreme Court describes a similar state tax as "taxation of persons progressively according to their ability to pay". State *ex. rel.* Bolens *v.* Frear (1912) 148 Wis. 456, 506, 134 N. W. 673.

[8] Van Beil *v.* Brogan, *supra.*

[9] Catawissa R. R. *v.* Phila. & Reading Ry., *supra*; Little Schuylkill Nav. R. R. & Coal Co. *v.* Phila. & Reading Ry. (1916) 44 Pa. County Ct. Rep. 197; Haight *v.* Railroad (1867) 73 U. S. 15; otherwise the tax would be imposed "in proportion to a man's poverty and not his wealth"; s. c. (D. C. 1867) 11 Fed. Cas. No. 5,903. The lease substitutes as the lessor's property the rent and the reversion instead of the land, and the presumption is that each man is to be taxed on his own property. Erie & Pittsburg R. R. *v.* Pennsylvania R. R. (1904) 208 Pa. 506, 57 Atl. 980.

[10] *E. g.,* a covenant that all payments are to be assumed and discharged by the lessee just as if he were primarily liable for the same. North Pa. R. R. *v.* Phila. & Reading Ry., *supra.* As the contract in Suter *v.* Jordan Marsh Co., *supra,* was made before the passage of the Act of Oct. 3rd, 1913, it did not contravene the provision in paragraph E, 38 Stat. 171, "nor shall any contract entered into after this Act takes effect be valid in regard to any Federal income tax imposed upon a person liable to such payment".

favored, since it is opposed to the spirit and the expressed intent of the Income Tax Law.[11]

SUBSEQUENT VALIDATION OF UNCONSTITUTIONAL STATUTE.—The effect on an unconstitutional statute of subsequently altered circumstances depends necessarily on the real nature of unconstitutionality. If such a statute is void in its inception, it can never become effective under any circumstances, but if it is merely unenforcible by the courts, it may be applied when the invalidating circumstance is removed. In support of the latter view it is argued that the judiciary, having no legislative power, cannot annul any statute, and that, since the function of the court is properly limited to a decision of the specific case between the parties before it, its holding is merely a refusal to apply the statute in that case because to do so would violate the constitution.[1] But this view ignores the fundamental theory of constitutional government, that the sovereignty is in the people, and that the power of the legislature is delegated, and limited to the bounds prescribed by the constitution.[2] If the legislature attempts to exceed these bounds, its act must be disregarded as though non-existent.[3] The court in declaring a statute unconstitutional does not annul it, but rather takes cognizance that the statute is a nullity *per se*, and refuses to apply it because in fact there is no such law.[4] And this view is generally sustained in the typical case of a subsequent amendment to the constitution removing the inhibition. Though the enforcement of the statute would no longer violate the constitution, it is still regarded as

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But this prohibition has apparently been removed in the present Act (1916) 39 Stat. 765, which merely states that the purpose of the Act is that "said tax shall be paid by the owner of such income, or the proper representative having the receipt, custody, control, or disposal of the same."

[11]See note 10, *supra*. The same reasoning applies to the interpretation of the covenants in tax-free bonds.

[1]*In re* Wallington (1834) 33 Mass. 87, 95; see Commonwealth *v.* Chesapeake & O. Ry. (1916) 118 Va. 261, 87 S. E. 622; Allison *v.* Corker (1902) 67 N. J. L. 596, 52 Atl. 362; Shephard *v.* Wheeling (1887) 30 W. Va. 479, 4 S. E. 635.

[2]McClain, Constitutional Law (2nd ed.) 16, 19.

[3]Cooley, Constitutional Limitations (7th ed.) 5, 259; see Gunn *v.* Barry (1872) 82 U. S. 610, 623; Norton *v.* Shelby County (1886) 118 U. S. 425, 442, 6 Sup. Ct. 1121.

[4]McClain, *op. cit.* 23; 1 Willoughby, Constitutional Law, 9. A recent case, Christian & Co. *v.* Chicago etc. Ry. (Minn. 1916) 159 N. W. 1082, illustrates that the validity of a statute is inherent from its inception, and that the decision of the court is merely declaratory of it. The court held that an injunction granted on the ground of the unconstitutionality of a statute does not prevent causes of action from arising under the statute if in fact it is constitutional, nor does it retard the running of the Statute of Limitations against such causes of action unless there is specific statutory provision to that effect. That protection is afforded to officers acting under an unconstitutional statute, see 6 Columbia Law Rev. 586, or persons paying money thereunder, see 15 Columbia Law Rev. 85, or acting on a decision that it is unconstitutional which is later reversed, see 10 Columbia Law Rev. 688, is not at odds with the doctrine of the nullity of an unconstitutional statute, but is rather an exception to the rule based on public policy.